



**U.S. Citizenship
and Immigration
Services**

**Non-Precedent Decision of the
Administrative Appeals Office**

MATTER OF C-H-H-S-, INC.

DATE: AUG. 22, 2017

MOTION ON ADMINISTRATIVE APPEALS OFFICE DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, a home healthcare provider, seeks to employ the Beneficiary as operations manager. It requests her classification as a member of the professions holding an advanced degree under the second-preference, immigrant category. *See* Immigration and Nationality Act (the Act) section 203(b)(2)(A), 8 U.S.C. § 1153(b)(2)(A). This employment-based, "EB-2" category allows U.S. businesses to sponsor foreign nationals for lawful permanent resident status if they have master's degrees, or bachelor's degrees followed by at least five years of experience.

The Director of the Texas Service Center denied the petition and the Petitioner's following motion to reopen. The Director concluded that the record did not establish the Petitioner's required ability to pay the proffered wage. For the same reason, we dismissed the Petitioner's appeal and denied its following three sets of motions to reopen and reconsider.¹ *See Matter of C-H-H-S-, Inc.*, ID# 271888 (AAO Apr. 20, 2017).

The matter is now before us on the Petitioner's fourth set of motions to reopen and reconsider. The Petitioner submits additional evidence that it asserts establishes its ability to pay the proffered wage.

Upon review, we will deny the motion to reopen and motion to reconsider.

I. LAW

A petitioner must demonstrate its continuing ability to pay a proffered wage from a petition's priority date until a beneficiary obtains lawful permanent residence. 8 C.F.R. § 204.5(g)(2). Evidence of ability to pay must include copies of annual reports (if a petitioner is a publicly traded company), federal income tax returns, or audited financial statements. *Id.*

In this case, the accompanying labor certification states the proffered wage of the offered position of operations manager as \$156,520 a year. The petition's priority date is September 22, 2010, the date

¹ The instructions to Form I-290B, Notice of Appeal or Motion, allow the joint filing of motions to reopen and reconsider. *See* 8 C.F.R. § 103.2(a)(1) (incorporating form instructions into the regulations).

the U.S. Department of Labor received the application for certification. *See* 8 C.F.R. § 204.5(d) (explaining how to determine a petition's priority date).

In determining ability to pay, U.S. Citizenship and Immigration Services (USCIS) examines whether a petitioner paid a beneficiary the full proffered wage each year from a petition's priority date. If a petitioner did not annually pay the full proffered wage, USCIS next examines whether it generated sufficient annual amounts of net income or net current assets to pay any difference between the annual proffered wage and actual wages paid. If net income and net current assets are insufficient, USCIS may consider other factors affecting a petitioner's ability to pay. *See Matter of Sonegawa*, 12 I&N Dec. 612, 614-15 (Reg'l Comm'r 1967).²

In our prior decisions, we found that, based on the Petitioner's payments to the Beneficiary and its annual amounts of net income and net current assets, the record did not establish its ability to pay the proffered wage in 2010 or 2011. We also found that the Petitioner did not demonstrate its ability to pay the combined proffered wages of this petition and at least 11 others that remained pending or approved after this petition's priority date. *See Patel v. Johnson*, 2 F. Supp. 3d 108, 124 (D. Mass. 2014) (requiring a petitioner to demonstrate its ability to pay the combined proffered wages of multiple, pending petitions).³ In addition, under *Sonegawa*, we found that the totality of the circumstances did not establish the Petitioner's ability to pay.

II. ANALYSIS

A. The Motion to Reopen

A motion to reopen must state "new facts" and be supported by documentary evidence. 8 C.F.R. § 103.5(a)(2). Reasserting previously stated facts or resubmitting previously provided evidence does not constitute "new facts." We may grant a motion that satisfies these requirements and demonstrates eligibility for the requested immigrant benefit.

In this case, much of the evidence supporting the Petitioner's current motion to reopen was previously submitted, including: its federal income tax transcripts for 2013 and 2014; and its net revenue reports for 2013 through 2015. We will therefore not discuss the previously received documents that were addressed in our prior decisions.

The motion's new evidence includes copies of the Beneficiary's IRS Forms W-2, Wage and Tax Statements, and federal income tax returns for 2015 and 2016. These documents indicate that the

² Federal courts have upheld USCIS' method of determining a petitioner's ability to pay. *See, e.g., River St. Donuts, LLC v. Napolitano*, 558 F.3d 111, 118 (1st Cir. 2009); *Four Holes Land & Cattle, LLC v. Rodriguez*, No. 5:15-cv-03858, 2016 WL 4708715 (D.S.C. Sept. 9, 2016); *Estrada-Hernandez v. Holder*, 108 F. Supp. 3d 936, 942-43 (S.D. Cal. 2015).

³ USCIS records indicate two additional petitions by the Petitioner that remained pending or approved after this petition's priority date: [REDACTED] and [REDACTED]. In any future filings in this matter, the Petitioner must provide the proffered wages of these two petitions to demonstrate its ability to pay the combined proffered wages of all applicable petitions.

Petitioner paid the Beneficiary wages of \$71,503.24 in 2015 and \$72,644.37 in 2016. The wage amounts for 2015 and 2016 do not equal or exceed the annual proffered wage of \$156,520. The record therefore does not establish the Petitioner's ability to pay the proffered wage in 2015 or 2016 based on the wages it paid the Beneficiary.

The Petitioner also submitted Forms W-2 indicating that its sister corporation paid the Beneficiary \$41,600 in 2015 and \$44,208.99 in 2016. As discussed in our appellate decision, however, payments by the other company do not establish the Petitioner's ability to pay the proffered wage. *See Sitar Rest. v. Ashcroft*, No. Civ. A. 02-30197-MAP, 2003 WL 22203713, *2 (D. Mass. Sept. 18, 2003) (finding that "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [USCIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage").

Thus, crediting only the Petitioner's payments to the Beneficiary, the company must demonstrate its ability to pay differences between the annual proffered wage and the actual wages paid of \$85,016.76 in 2015 and \$83,605.63 in 2016. The Petitioner's federal income tax transcript for 2015 reflects net income of -\$384. The transcript does not provide enough information to calculate the company's net current assets for that year, and the Petitioner did not submit a copy of its actual 2015 tax returns. The record therefore does not establish the Petitioner's ability to pay the difference between the annual proffered wage and actual wages paid in 2015.

For 2016, the Petitioner submitted a net revenue report and a projected income statement. These documents, however, do not indicate that they were audited. *See* 8 C.F.R. § 204.5(g)(2) (requiring evidence of ability to pay to include copies of annual reports, federal income tax returns, or audited financial statements). The Petitioner also did not submit an annual report or federal income tax return for that year. The record therefore does not establish the Petitioner's ability to pay in 2016.

The new evidence in the Petitioner's motion to reopen does not demonstrate the Petitioner's ability to pay the proffered wage in 2015 or 2016, nor does it establish the company's ability to pay in 2010 or 2011. The new evidence also does not change our analysis under *Sonegawa*, as the materials do not materially affect the number of years the Petitioner has conducted business, its number of employees, its incurrence of uncharacteristic expenses or losses, its reputation in its industry, or other factors relevant to its ability to pay. In addition, the motion does not include previously requested information about the Petitioner's other pending petitions.

The record on motion does not establish the Petitioner's continuing ability to pay the proffered wage from the petition's priority date onward. We will therefore deny the motion to reopen.

B. The Motion to Reconsider

A motion to reconsider must establish that our decision was based an incorrect application of law or policy and that the decision was incorrect based on the evidence in the record of proceedings at the time of the decision. 8 C.F.R. § 103.5(a)(3).

Here, the Petitioner's motion asserts that its new evidence demonstrates its ability to pay the proffered wage. But the motion does not establish, or even assert, that our prior decision was based on an incorrect application of law or policy. We will therefore deny the motion to reconsider.

III. CONCLUSION

The Petitioner's motion to reopen does not demonstrate its ability to pay the proffered wage. The Petitioner's motion to reconsider does not establish our incorrect application of law or policy.

ORDER: The motion to reopen is denied.

FURTHER ORDER: The motion to reconsider is denied.

Cite as *Matter of C-H-H-S-, Inc.*, ID# 652063 (AAO Aug. 22, 2017)